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JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

CHESTER G. VERNIER AND WILLIAM G. HALE

CONTEMPT.

Toledo Newspaper Co. v. U. S., 38 Sup. Ct. Repr. 560. *Obstruction of Justice by Newspaper.*

Judicial Code (Act March 3, 1911, c. 231), Sec. 268, 36 Stat. 1163 (Comp. St. 1916, Sec. 1245), first enacted as Act March 2, 1831, c. 99, 4 Stat. 487, which declares that courts shall have the power to punish contempts of their authority, provided that such power shall not be construed to extend to any cases, except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, confers no power not already granted, and imposes no limitations not already existing, but merely marks the boundaries of existing authority and, conformably to the whole history of the country, recognized and sanctioned the existence of the power of federal courts to restrain acts tending to obstruct and prevent the untrammelled and unprejudiced exercise of the judicial power; so the publication of newspaper articles which tend to obstruct the administration of justice may be treated as a "contempt."

Newspaper articles, referring to a suit in the federal court to enjoin municipal ordinances regulating street car fares, which held the federal judge up to ridicule and hatred in case he should grant an injunction, and in advance impeached his motives in so doing, and practically urged non-compliance with any such order, must be deemed acts tending to obstruct the administration of justice, within Judicial Code, Sec. 268, and punishment for contempt cannot be avoided on the ground that it did not appear the judge saw the articles or that he was unaffected by them.

Mr. Justice Holmes and Mr. Justice Brandeis dissenting.

CONSTITUTIONAL LAW.

State v. Cook, W. Va. 95 S. E. 792. *Equal protection of the laws: excluding persons of African descent from jury.*

Whenever by any action of a state, whether through its Legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand or petit jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him contrary to the Fourteenth Amendment to the Constitution of the United States.

The fact that there were no persons of African descent upon the grand jury such indictment, or upon the petit jury summoned for the purpose of trying the defendant, does not of itself show the exclusion of such persons solely because of race or color.

CORPORATIONS.

State v. Lehigh Valley R. Co., N. J. 103 Atl. 685. *Criminal liability of corporation for manslaughter.*

A corporation aggregate may be held criminally for manslaughter.

An indictment in the statutory form charging a corporation aggregate with manslaughter will not be quashed for failure to specify whether voluntary or involuntary manslaughter is meant.

EMBEZZLEMENT.

U. S. v. Wertzel, 38 Sup. Ct. Repr. 381. "*Agent.*"

A receiver of a national bank appointed by the Comptroller of the Currency under Rev. St. Sec. 5234 (Comp. St. 1916, Sec. 9821), being an officer of the United States instead of the bank, is not an agent of the bank within section 5209 (Comp. St. 1916, Sec. 9772), denouncing the offense of embezzlement and making false entries by every president, director, cashier, teller, clerk, or agent of a national bank; the conclusion being strengthened by the principle of *noscitur a sociis*, in view of the position of the word "agent" in the section.

Statutes creating and defining crimes are not extended by intendment because the court thinks the Legislature should have made them more comprehensive. Therefore Rev. St. Sec. 5209, denouncing the offense of embezzlement or making false entries by a president, director, cashier, teller, clerk, or agent of a national bank, cannot by implication be extended so as to embrace receivers appointed by the Comptroller of the Currency, on the ground that otherwise there would be no statute applying to embezzlement by such receivers.

EVIDENCE.

State v. Gilligan, Conn. 103 Atl. 649. *Proof of intent to poison by proof of other crimes.*

Where accused keeper of house for old people secretly borrowed money from an inmate who was poisoned, and proof of other killings by accused of inmates by poison were inadmissible, evidence of financial transactions and purchases of poison connected only with such other killings was also inadmissible.

Roraback and Wheeler, JJ., dissenting from reasoning of opinion.

EXTRADITION.

Taft v. Lord, Conn. 103 Atl. 644. "*Fugitive from Justice.*"

Where a husband and father, who had married in New York state, resided there with his wife, and had children born to him, left the state to go to Connecticut to find work, giving his wife money for her and the children's maintenance until he could send them more or bring them to Connecticut, and after he found work in Connecticut sent on for his wife and children and established them in his home in Connecticut, which they later left, returning to New York on account of a quarrel, after which the husband sent the wife no money for her support or the support of the children, such husband was not a "fugitive from justice" from New York to Connecticut within Const. U. S., Art. 4, Sec. 2, justifying his arrest by the executive authority of Connecticut for rendition to New York on its demand on indictment for abandonment, since no one can be considered a fugitive from justice and extraditable as such who has not either committed some crime in the demanding state or done therein some overt act intended to be a

material step in the accomplishment of a crime subsequently consummated somewhere.

To constitute one a "fugitive from justice" within Const. U. S., Art. 4, Sec. 2, as to the rendition of such fugitives between states, the person, having been in the one state, must have left it and come within the jurisdiction of the other state, and must have incurred guilt before he left the one state and while bodily present in it, and one who is without the jurisdiction of the one state when he is wanted there to answer a criminal charge does not, by his absence alone, become a fugitive from justice nor does he from the mere fact that he has rendered himself liable to criminal prosecution in that state.

INDETERMINATE SENTENCE.

People v. Lee, Calif. 172 Pac. 158. *California statute construed.*

Under Pen. Code, Sec. 1168, added by St. 1917, p. 665, providing for indeterminate sentence, not greater than maximum nor less than minimum of the term fixed for the particular offense, a sentence of one convicted of manslaughter to from one to ten years' imprisonment is erroneous in view of section 193, fixing a maximum imprisonment for manslaughter of ten years, but fixing no minimum term.

People v. Hall, Calif. 172 Pac. 1116. *Effect of error in applying indeterminate sentence law.*

Where an offense was committed before the indeterminate sentence law took effect, an indeterminate sentence cannot be given.

A conviction will not be reversed for error in giving an indeterminate sentence for an offense committed before the indeterminate sentence law went into effect, but the case will be remanded, with instructions to give a proper sentence.

INDICTMENT.

Knight v. State, Ga. 95 S. E. 679. *Specifying means used in homicide.*

Where an indictment alleged that the accused killed a woman by shooting her with "a certain pistol and with a certain rifle," it was not error to overrule a demurrer based on the ground that the homicide was charged as committed with two different instruments, alleged conjunctively, that it is physically impossible to kill a person with a gun and a pistol at the same time, and that one of them alone must have produced the death. *Walker v. State*, 141 Ga. 525, 81 S. E. 442, and authorities cited.

State v. Rubin, N. J. 103 Atl. 390. *Description of stolen goods: indefiniteness.*

An indictment for stealing, or receiving, knowing it to have been stolen, 125 pounds of brass, is not bad for indefiniteness, because not specifying nature and form of the brass; the assumption that brass cannot exist in an unmanufactured state, or at least without having been given some specific form, being untenable.

INSANITY.

Polk x. State, Ga. 95 S. E. 988. *Burden of proof.*

Exception is taken to the following charge to the jury: "The law presumes every man sane until it is made to appear, to the contrary, that he is insane or of unsound mind. And if a man files that plea, the burden is on

him to make it appear to the satisfaction of the jury: it ought to be made to appear to a reasonable certainty that at the time of the commission of the act, if any, he did not know the nature and quality of the act, or, if he did know, he did not know the act was wrong." The error assigned is that the charge placed upon the defendant a greater burden than the law requires; "the court put upon the defendant the burden to make it appear to a reasonable certainty that the accused was insane, when the true rule is merely that the defendant must show insanity by the preponderance of evidence." The homicide was admitted. The sole defense was insanity at the time of the commission of the homicide. The defendant offered no evidence whatever; he relied upon his statement alone. The court charged the jury as follows: "If after a full, fair, and honest examination of this evidence in connection with the defendant's statement, your minds are unsettled, unsatisfied, do not know what the truth about it is, then that is what is called a reasonable doubt in law, and you should give him the benefit of that reasonable doubt and acquit him." Held, that the criticism of the instruction excepted to is well taken; but under the facts of the case, and in view of the subsequent charge last quoted, and the whole charge, the error pointed out is not such as to require a reversal.

INSTRUCTIONS.

State v. Worley, W. Va. 96 S. E. 56. *Reasonable doubt*.

An instruction, attempting to define the term "reasonable doubt," and concluding with these words addressed to the jury, "if you doubt as men you should doubt as jurors; if you do not doubt as men you should not doubt as jurors"—should be refused.

INTOXICATING LIQUORS.

State v. One Packard Automobile, Okla. 172 Pac. 66. *Seizure and forfeiture of automobile under statute: "appurtenance."*

An automobile used April 27, 1916, in the unlawful conveyance of intoxicating liquor in the presence of an officer having power to serve criminal process, was not subject to seizure by such official and forfeiture to the state under the provision of section 3617, Rev. Laws 1910, and is not an "appurtenance" within the meaning of that section, which provided: "When a violation of any provision of this chapter (chapter 39, Intoxicating Liquors) shall occur in the presence of any sheriff, constable, marshal, or other officer having power to serve criminal process, it shall be the duty of such officer, without warrant, to arrest the offender and seize the liquor, bars, furniture, fixtures, vessels and appurtenances thereunto belonging so unlawfully used."

Brett, J., dissenting.

OBSCENITY.

State v. Payne, Okla. 172 Pac. 1096.

Under section 2403, Rev. Laws 1910, making it a misdemeanor to "utter or speak and obscene . . . or lascivious language or word in any public place, or in the presence of females, or in the presence of children under ten years of age," the language used need not necessarily consist of words obscene or lascivious per se, but where the information sets out the language, although it may be composed of words which are not in themselves either obscene or

lascivious, yet if the sense and meaning of the words employed is either obscene or lascivious, the information is sufficient to state the offense, where all other allegations necessary to complete said offense are contained therein.

PROSTITUTION.

State v. Kelly, Wash. 172 Pac. 1175. *Statutory construction: "every person."*
"Every person" as used in Rem. Code, 1915, Sec. 2440, providing that "every person" who shall live with or accept any earnings of a common prostitute, etc., shall be punished, etc., includes females as well as males.

STATUTE OF LIMITATIONS.

Pitts v. State, Ga. 95 S. E. 935. *When statute begins to run in bigamy case.*
It is marrying, or going through the form of marriage, which the law has enjoined as requisite to the creation of the marital relation, by a person who has a husband or wife living, with knowledge of such fact, that constitutes the offense of bigamy under our statute; and the offense is completed upon the second marriage. Subsequent cohabitation is not a necessary element in the offense; nor will subsequent cohabitation render it a continuing offense, so as to fix the time of cessation of the cohabitation as the point from which the statute of limitations will begin to run.

TRIAL.

People v. Webster, Calif. 172 Pac. 768. *Conduct of counsel.*
There can be no excuse for flagrantly improper conduct of assistant district attorney, in referring to prior conviction for similar offense after the court had stricken out all reference thereto, and in saying what he would do, had prosecutrix in rape case been his daughter.

But such error was harmless, where the record of defendant's guilt was very clear and convincing.

WITNESSES.

McWhorter v. State, Ga. 95 S. E. 1013. *Judicial endorsement.*
Upon the trial of this case several police officers testified for the state, and none for the defendant. The defendant's conviction was not demanded by the evidence. Under these facts it was error, requiring the grant of a new trial, for the court to charge the jury as follows: "But the fact that a man is an officer is nothing against him. *We rely upon these officers.*" This is true, even though in immediate connection with this charge the judge tells the jury: "I charge you, the fact that a man is a detective or police officer should not discredit his testimony. It goes to his credit that he is actively engaged in the prosecution of the case, . . . and the fact that they (the detectives and police officers) receive money from people for recovering their property which has been stolen is a fact which you may consider. If they get money in any case for the purpose of securing a conviction, or if a conviction depends on their evidence, it should go to their credit, and largely to their credit." For the presiding judge in his charge to designate a class of witnesses, and to tell the jury, "We rely upon" them, is to give to these officer witnesses "judicial indorsement and approval," and "to give an improper potency to the influence" of their testimony. Civil Code, 1910, Sec. 4863; *Potter v. State*, 117 Ga. 693, 695, 696, 698, 45 S. E. 37; *Alexander v. State*, 114 Ga. 266 (2), 267, 268, 40 S. E. 231; *Pound v. State*, 43 Ga. 88, 90 (7).

INNOCENT AND ARRESTED BY MISTAKE—CAN THE RECORD BE DESTROYED?

That an innocent person, arrested through mistake, has no right to have the record of the arrest made by the police under statutory authority cancelled or destroyed is held in the Michigan case of *Miller v. Gillespie*, 163 N. W. 22, L. R. A., 1917, E., 774.

This case seems to be the first to have directly passed upon the question of the right of one who has been arrested to have the record of such arrest as made and retained for possible future reference by the police surrendered for cancellation. However, the denial of a right to have such record destroyed is in keeping with the weight of authority upon the closely allied question of the right to take and retain in a rogue's gallery the picture of one accused of crime before conviction.—JOSEPH MATTHEW SULLIVAN, Boston, Mass.

REFORMATORIES NOT PENAL INSTITUTIONS.

Webb, U. S.: Attorney General, State of California. Opinion as to whether state reformatories may be classed as penal institutions with reference to compliance with provisions of Section 6, Chapter 723, Statutes of 1917. This chapter creates a State Bureau of Criminal Identification, repealing an earlier act covering the same subject matter. By Section 6 of the act it is provided that the board of managers of said bureau shall keep on file a record of all measurements, photographs and descriptions of persons confined in state penal institutions. That there was intended to exist a distinction between a penal institution and a reformatory is in part ascertainable from the language of Section 2, Article X, Constitution of California, referring to the powers of the State Board of Prison Directors. The latter are given the charge of the state prisons and to them are delegated such powers "in respect to other penal and reformatory institutions of the state" as prescribed by the legislature. The general law on the subject of state prisons is found in Title I, Part III, of the Penal Code, and designates the two prisons as San Quentin and Folsom. The acts establishing the Preston School of Industry, Statutes of 1889, page 100, and the Whittier State School, Statutes of 1889, amended by Statutes of 1893, page 238, are shown to be for the purpose of providing schools for the discipline, education and employment of juvenile delinquents. The theory of the Juvenile Law, enacted by Statutes of 1915, page 1225, is to separate juvenile and adult offenders. The two schools come within the meaning of Section 24 of said act as desirable places to which such children may be sent. It was held in the case of *Ex Parte Ah Peen*, 51 Cal. 280, that the committing of a minor to the industrial school department of San Francisco did not amount to a criminal prosecution, but that it was intended to train the child so that his future might be useful when reclaimed to society. In the case of *Ex Parte Liddell*, 93 Cal. 633, the law creating the Whittier State School was held constitutional. It was therein decided (1) the legislature has power to provide for the detention and education of juvenile offenders, and (2) that the object of the act is not punishment, but reform, discipline and education. It observed that the conditions surrounding a child are vastly different than if sent to a state prison or county jail. It was pointed out "He is given the opportunity and instruction to learn a trade and qualify himself for the duties of citizenship." The court differentiated between being in a state prison and in a reform school and pointed out that if boys are "honorably discharged are released from all penalties and disabilities resulting from the offenses or crimes for

which they are committed." The exact language contained in these lines of reasoning was employed with approval in the case of *Ex Parte Nichols*, 110 Cal. 651, which held as constitutional the act establishing Preston School of Industry. Definitions of the words "penal" and "reformatory" as laid down by standard legal authority and cited in the opinion "indicate that the law recognizes a distinction between a 'penal institution' and a 'reformatory.'" In all legislation affecting this bureau nothing is included requiring such information to be furnished by the superintendents of the reform schools, but the Statutes of 1909, page 398 (and now in force) direct that the wardens of the state prisons shall send "*to the legalized Bureau of Identification*" such information. The opinion concludes with the following statements: "Therefore the said prisons being named and the reformatories not referred to, we see an additional reason for believing that there was no intention to require the reformatories to furnish these records to your bureau (State Bureau of Criminal Identification and Investigation). Therefore the Whittier and Preston reformatories are not to be classed as penal institutions, and as being required to comply with this provision."

The foregoing opinion was given in a letter addressed to me by Attorney General U. S. Webb, under date of February 28, 1918.—FRED C. NELLES, Superintendent Whittier State School.